Conversent Communications

VIA ELECTRONIC & OVERNIGHT MAIL

June 10, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: TRO Switching Investigation, DTE 03-60 — Supplemental Citation of Authority

Dear Ms. Cottrell:

Conversent Communications of Massachusetts, LLC ("Conversent") respectfully submits three additional sources of support for its Response in Support of a Standstill Order, filed today.

The first two are recent state commission orders requiring Verizon to continue to provide UNEs indefinitely, until further commission order:

> *In re Investigation of the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market,* Docket No. I-00030100, Reconsideration Order (Pa. PUC, May 28, 2004) ("PA Order")[1]; and
>
> *In re Verizon West Virginia, Inc.: Petition for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in West Virginia pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order,* Case No. 04-0359-T-PC, Commission Order (W. Va. PSC, June 8, 2004) ("West Virginia Order")[2].

The third item is a news report quoting FCC Chairman Powell this afternoon, that the Commission will draft new unbundling rules to replace those vacated by *USTA II.*

Conversent respectfully requests that the Department consider these three items.[3]

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[1] http://puc.paonline/PcDocs/467014.doc.

[2] http://www.psc.state.wv.us/orders/2004_06/040359ca.htm.

[3] Conversent does not believe that a motion to file this supplemental citation of authority is necessary, as it contains no argument additional to that in Conversent's Response in Support of a Standstill Order, filed today. In addition, it is being electronically served upon the parties on the same day as, and filed in paper form at the Department only one day after, Conversent's Response. No party will be prejudiced by Conversent's filing of the paper copy of this

PA Order. In its investigation of enterprise switching pursuant to the Triennial Review Order analogous to this proceeding, the Pennsylvania Commission ordered Verizon to continue to comply with a December 2003 order requiring it to continue to provide unbundled switching and UNE-P to enterprise customers under state law as set forth in state tariff, at the tariffed, TELRIC-based pricing, until further Commission order. PA Order at 11-12.

The Pennsylvania Commission noted that no court has found its state-law unbundling determination to be preempted; indeed, the *USTA II* court found the preemption claims premature. *Id.*

In addition, the Commission also found support for a continuing unbundling obligation under § 271. The Commission also determined that it could not remove an element from the § 271 unbundling requirement.

> We conclude that there is no firm basis for this Commission to unilaterally sanction removal of a § 271 element from Verizon's offerings in Pennsylvania under the present state of FCC orders. If Verizon believes that its § 271 obligations in Pennsylvania have changed, it should put that issue to the FCC. Upon FCC approval of Verizon's position, modifications of relevant offerings would then be appropriate.

Id. at 12-13.

Finally, the Commission required Verizon to continue providing the UNEs at the tariffed price, as those rates had been found to be just and reasonable.

> [T]he order merely provides that existing Tariff No. 216 rates be used at present because they are currently in effect and fall within the range of a just and reasonable price.

Id. at 11. The Commission noted that Verizon had available, but had not chosen to employ, state-law procedures to seek amendment of the tariff. *Id.* at 11-12.

The Commission found justification for its order in the uncertainty resulting from the *USTA II* decision:

> Meanwhile, the uncertainty again supports our observation that the Tariff No. 216 rates are currently in effect and should be used until a new rate is properly established.

Id. at 12.

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letter merely one day after Conversent's Response. If a formal motion is required, however, Conversent so moves, for the reasons set forth in this footnote and footnote no. 4.

The PA Order provides additional support for Parts I and II of Conversent's Response. In particular, like Pennsylvania's enterprise UNE-P unbundling determination, the Department's dark fiber unbundling requirement also has been embodied in a state tariff. The Pennsylvania Commission's determination that state-tariffed UNEs have not been federally preempted, applies equally here. Also applying with equal force is the Pennsylvania Commission's determination that Verizon must continue to provide state-tariffed UNEs unless and until the tariff is amended, through normal state tariff modification procedures, to eliminate the requirement to provide such UNEs.

West Virginia Order. In the consolidated arbitration proceeding analogous to D.T.E. 04-33, the West Virginia Public Service Commission has issued a standstill order requiring Verizon to continue to provide all current UNEs indefinitely, until further Commission order. The order was explicit and broad:

> IT IS FURTHER ORDERED that Verizon-WV is required to continue to provide UNEs, including but not limited to: dedicated interoffice transport (including dark fiber interoffice transport), high-capacity loops, and mass market switching - at the rates, terms and conditions presently contained in its current interconnection agreements, unless or until the Commission authorizes Verizon-WV to cease providing specific UNEs.

The Commission's reason for this order was based on its concern that local competition would be harmed if Verizon discontinued providing these UNEs.

> Provision of UNEs is required because this Commission has not determined that local competition can continue to exist or to grow in their absence.

The West Virginia Order, therefore, is supplemental authority for Parts I.D and II of Conversent's Response.[4]

Chairman Powell's Statement. Chairman Powell's statement confirms that there will be a remand proceeding to reconsider the federal unbundling rules for the UNEs subject to the *USTA II* remand. And, such a proceeding will be "relatively expeditious." Thus, as Conversent suggested in Part III of its Response, any absence of federal unbundling rules with respect to those UNEs will be only temporary.

Therefore, if the Department permits Verizon to cease providing the *USTA II* UNEs, there potentially will be *two* substantial changes to the UNE regime — one when Verizon stops

[4] In addition, the West Virginia Order was issued on June 8, and Conversent only became aware of it on June 9, after delivering its Response in Support of a Standstill Order to the overnight courier for filing on June 10. Therefore, Conversent could not include a citation to the decision in its Response.

providing the *USTA II* UNEs such as dark fiber transport, the second when the FCC reinstates most or all of them. Issuance of a standstill order will lessen the costs and market-disruptive effects of two such changes.

Conclusion. Pennsylvania and West Virginia have joined the growing number of states that have issued standstill orders to protect consumers by maintaining stability in the telecommunications market. The FCC will issue new unbundling rules, and will issue them "relatively expeditious[ly]," rendering any absence of federal unbundling rules only temporary. The Department should issue a standstill order until the FCC issues those new unbundling rules, as Conversent suggests.

Respectfully submitted,

Gregory M Kennan

Gregory M. Kennan
Director, Regulatory Affairs and Counsel

Cc: Service List

GMK/cw

Enclosure

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Public Meeting held May 27, 2004

Commissioners Present:

Terrance J. Fitzpatrick, Chairman
Robert K. Bloom, Vice Chairman
Glen R. Thomas
Kim Pizzingrilli
Wendell F. Holland

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market

Docket No. I-00030100

RECONSIDERATION ORDER

BY THE COMMISSION:

Before the Commission is Verizon Pennsylvania Inc.'s (Verizon's) Petition for Reconsideration of that section of our December 18, 2003 Order (*December Order*) that addresses the continuing obligations of Verizon to provide competitors with access to its local circuit switching. In that Order, we found on the record before us no compelling justification to petition the Federal Communications Commission (FCC) for a waiver of its "no impairment" finding for local switching in the enterprise market. Verizon takes no issue with this finding. We further stated, however, that pursuant to our *Global Order* and 47 U.S.C. § 271(c)(2)(B)(vi) Verizon has a continuing obligation to provide requesting carriers with access to its local circuit switching at the rates contained in Verizon's Tariff 216. It is this continuing obligation section of the *December Order* to which Verizon's petition is directed. We will grant-in-part and deny-in-part the petition.

Factual and Procedural Background

In 1996, Congress adopted a national policy of promoting local telephone competition through the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *amending* the Communications Act of 1934, *codified at* 47 U.S.C. §§151, *et seq.* (Act). The Act relies upon the dual regulatory efforts of the FCC and its counterpart in each of the states, including the Commission, to foster competition in local telecommunications markets. *See generally Verizon Communications Inc. v. Trinko*, 124 S. Ct. 872, 881-883 (2004) (discussing regulatory structure of the Act). The goals of the Act are accomplished in part through the imposition of particular access obligations upon incumbent local exchange carriers, like Verizon, and Regional Bell Operating Companies (BOCs), also including Verizon. Relevant access obligations are set forth in 47 U.S.C. §§ 251(c)(3) and 271(c)(2)(B)(vi), respectively. Additional relevant obligations may also be imposed by state law on a state-specific basis. 47 U.S.C. § 251(d)(3) (preserving state access regulations).

In 1999, in order to promote competition in local markets, we ordered Verizon to provide the Unbundled Network Element Platform (UNE-P) to competitors for service to business customers with total billed revenue from local services and intraLATA toll services at or below $80,000 annually. *Global Order*[1] at 85-92. UNE-P was defined to be "a combination of all network elements required to provide local service to an end user. It contains, at a minimum, the loop, switch port, switch usage, and transport elements." *Id*. at 85. The obligation to provide UNE-P was imposed through December 31, 2003, after which time Verizon was invited to demonstrate to the Commission that the obligation should no longer be imposed. *Id*. at 90. Our *December Order* at 14 observed the continuation of the *Global Order* obligation. Concurrently, the *December*

[1] *Joint Petition of Nextlink et al*., Opinion and Order (entered Sep. 30, 1999), Docket Nos. P-00991648 and P-00991649 (*Global Order*).

Order at 16 cautioned Verizon's competitors against assuming that this state law obligation would continue indefinitely.

In 2001, the FCC granted Verizon's request for authorization to provide in-region, interLATA services in Pennsylvania. *Pennsylvania 271 Order*.[2] Authorization was granted as in the public interest because, in part, this Commission had put into place and was actively providing oversight of Verizon's performance assurance plan (PAP), which provided the FCC with assurance the local market would remain open. *Pennsylvania 271 Order* at 127. The PAP measures, among other things, aspects of Verizon's UNE-P performance.

In 2003, the FCC issued an order relieving Verizon of its obligation under 47 U.S.C. § 251(c) to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS1 capacity and above loops, except where a state commission petitions the FCC for waiver and waiver is granted. *Triennial Review Orde*r (or *TRO*)[3] at ¶¶ 451-458; 47 C.F.R. § 51.319(d)(3). Absent switching, there is no UNE-P by definition. After review of the record in this proceeding, we decided not to petition the FCC for waiver. *December Order*. Since § 251(c) does not presently impose upon Verizon an obligation to provide carriers with access to local circuit switching for service to end-user customers using DS1 capacity and above loops, the availability of UNE-P under § 251(c) for service to such customers has been eliminated.

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[2] *In the Matter of Application of Verizon Pennsylvania Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, FCC 01-269, CC Docket No. 01-138, Order (rel. Sep. 19, 2001).

[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, 18 FCC Rcd 16978, FCC 03-36, as corrected by FCC 03-227, CC Docket No. 01-338, Report and Order (rel. Aug. 21, 2003).

The FCC's *Triennial Review Order* was challenged by various petitioners, including this Commission, in the United States Court of Appeals for the District of Columbia. The case was argued January 28, 2004. On March 2, 2004, the court decided, among other things, that the Commission's challenge to the preemptive scope of the *TRO* was not ripe because the FCC "has not taken any view on any attempted state unbundling order." *U.S.T.A. v. F.C.C.*, 359 F.3d 554, 594 (D.C. Cir. 2004). The court also denied petitions for review of the FCC's determination regarding the unbundling of enterprise switches. *Id*. at 586-587. Regarding § 271, the court decided that there was "nothing unreasonable in the [FCC's] decision to confine TELRIC pricing to instances where it has found impairment [under § 251]." *Id*. at 589. The court also decided that the FCC was not unreasonable in deciding that any duty to combine network elements under § 251 does not apply to § 271 unbundling obligations. *Id*. The court distinguished its holding, however, from the separate question of whether the FCC's decision not to require combinations under § 271 satisfies the general nondiscrimination requirement of § 202. *Id*. at 590.

Our *December Order* distinguishes Verizon's distinct access obligations stemming from the *Global Order* (an exercise of our independent state law authority), the *Pennsylvania 271 Order* (memorializing federal requirements imposed on Verizon as a condition of entry into the long distance market pursuant to 47 U.S.C. § 271), and the *Triennial Review Order* (establishing minimum federal requirements pursuant to 47 U.S.C. § 251(c)). We recognized the FCC had relieved Verizon of the relevant obligation under § 251, but correspondingly recognized the continuation of the relevant access obligations under state law and, to an extent, under § 271.

On January 2, 2004, Verizon filed a Petition for Reconsideration of our *December Order*. Verizon challenges the lawfulness of that section of the *December Order* which recognized Verizon's continuing obligation to provide access to UNE-P under state law. Verizon also seeks clarification of our position on the rate at which carriers can obtain

access to local switching under § 271. On January 21, 2004, we granted the petition pending consideration on the merits.

An answer to the petition was filed by the Pennsylvania Carrier's Coalition (PCC).[4] A joint answer was filed by ARC Networks, Inc. d/b/a InfoHighway Communications Corp. and Metropolitan Telecommunications Corporation of PA (collectively ARC). A third answer was filed by MCI WorldCom Network Services, Inc. (MCI).

Verizon moved to strike MCI's answer. MCI answered Verizon's Motion to Strike.

Further, on April 16, 2004, before the FCC, Verizon filed an Emergency Request for Declaratory Ruling and Preemption. Verizon's filing urges the FCC to issue a declaratory ruling that the *December Order*—to the extent that it requires Verizon to continue to provide unbundled access to its local switching serving the enterprise market at TELRIC prices—is inconsistent with, and therefore preempted by, federal law. *In the Matter of Verizon Pennsylvania Inc. Petition for Declaratory Ruling and Order Preempting the Pennsylvania Public Utility Commission's Order Directing Verizon Pennsylvania Inc. To Provide Unbundled Access to Its Enterprise Switches*, File No. _____, Emergency Request for Declaratory Ruling and Preemption (filed April 16, 2004).

[4] The PCC is an informal group of competitive local exchange carriers comprised of Full Service Computing Corp. t/a Full Service Network ; ATX Licensing, Inc.; Remi Retail Communications, LLC; and Line Systems, Inc.

Position of the Parties

Verizon's position is that the *December Order*:

> appears to suggest (1) that Verizon PA has a separate and continuing additional unbundling obligation under the Commission's *Global Order* to provide unbundled switching and UNE-P to enterprise customers—a conclusion directly at odds with the 1996 Act, binding case law, and the FCC's express conclusions; and (2) that the TELRIC rates that apply to network elements unbundled pursuant to section 251 of the 1996 Act must also be applied to network elements unbundled pursuant only to section 271—an assumption expressly and unambiguously rejected by the FCC, which has controlling authority over this question.

Petition at 1. "Simply put, a state conclusion that 'yes, an ILEC is required to unbundle' actually and directly conflicts with the federal conclusion that 'no, the ILEC does not have to unbundle.'" *Id*. at 9. Thus, Verizon argues that the Commission's reading of the *Global Order* as imposing a continuing obligation to provide access to local switching directly conflicts with the FCC's national finding of non-impairment for enterprise switching, a finding made pursuant to § 251(d)(2). *Id*. Further, Verizon argues that any continuing access obligation imposed by § 271 does not require TELRIC pricing, rather Verizon is permitted to price access at a "market-based" rate. *Id*. at 12-13.

In support, Verizon cites a variety of authorities and theories. Verizon's petition cites: 47 U.S.C. § 251(d)(2) (requiring FCC to determine which network elements should be made available for purposes of § 251(c)(3)); 47 U.S.C. § 252(c)(1) (requiring state commissions to resolve arbitration disputes consistent with regulations prescribed by the FCC pursuant to § 251); *USTA v. FCC*, 290 F.3d 415, 417-18 (D.C. Cir. 2002) (opining that § 251 requires Verizon to unbundled its network elements on terms prescribed by the FCC); *TRO* ¶ 186 (stating that the FCC has responsibility for establishing a framework to implement the unbundling requirements of § 251(d)(2)); *AT&T v. Iowa Utils. Bd.*, 525

U.S. 366, 371, 378 n. 6, 387 n. 10 (1999) (for the assertion that state-specific unbundling requirements that do not mirror FCC requirements impede competition and are prohibited by the Act); *TRO* ¶¶ 187, 192, 195 (requiring state commissions to amend and alter state-specific decisions to conform to the FCC's unbundling rules); Brief for Respondents at 92-93, *U.S.T.A. v. F.C.C.*, No. 00-1012 (D.C. Cir., filed Dec. 13, 2003) (explaining FCC view that a FCC decision not to require an ILEC to unbundled a particular element reflects a "balance" struck by the agency and that any state rule that struck a different balance would conflict with federal law, thereby warranting preemption); and, *TRO* ¶ 72 (stating that FCC must interpret the Act's "impair" standard as requiring the FCC to determine the elements that "should or should not be unbundled").

Verizon also cites *TRO* ¶ 655, n. 1990 (declining to require BOCs, pursuant to § 271, to combine network elements that no longer are required to be unbundled under § 251); *TRO* ¶ 659 (concluding that § 271 requires BOCs to provide unbundled access to elements not required to be unbundled under § 251, "but does not require TELRIC pricing"); *TRO* ¶¶ 663 (discussing pricing of unbundled access pursuant to § 271 and deciding that the pricing methodology applicable to elements accessed pursuant to § 271 is the "basic just, reasonable, and nondiscriminatory rate standard of [47 U.S.C. §§ 201, 202] that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate service) the Communications Act."); *TRO* ¶¶ 659, 662-64 (further discussing pricing and enforcement); *Proceeding by the Dep't of Telecoms. And Energy on its own Motion to Implement the Requirements of the F.C.C.'s Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops*, D.T.E. 03-59, Order (issued Nov. 25, 2003) at 19 (holding that market prices that are subject to the disciplining effects of competitive forces are presumptively just and reasonable and that Verizon's pricing under § 271 would be subject to competitive forces).

PCC's position is that the *December Order* is consistent with federal law and that Verizon's Petition "fails miserably under the Commission's long-established standards

for reconsideration." PCC Answer at 2. "The bottom line is that this Commission is free and should continue its current policies originally established in the *Global Order* until a party, including Verizon, convinces this Commission that the policies should be changed." *Id*. at 4. Further, PCC argues that the FCC has not exercised exclusive jurisdiction over Verizon's § 271 obligations and notes Verizon's agreement to unbundle its network as a condition of providing in-region, interLATA service. *Id*. at 12, 20.

ARC's position, like PCC's, is that the Commission "clearly has the authority to take the actions it took in the [*December Order*], and the conclusions the Commission reached in the [*December Order*] are fully consistent with the 1996 Act." ARC Answer at 3. "Section 251(d)(3) does not preclude states from modifying the federal unbundling regime, as Verizon suggests, but rather, it bars only measures that require incumbents to violate the Act or preclude competitors from using elements to provide competing services." *Id*. at 5. "[T]he Act does not demand that state rules mirror exactly the FCC's regulations. Section 251(d)(3) of the Act clearly contemplates that the states will co-administer Section 251's market-opening mechanisms." *Id*. at 6. Regarding § 271 pricing, ARC notes that the *December Order* does not require TELRIC pricing, rather, the Commission held that Tariff No. 216 rates satisfy the "just and reasonable" pricing standard for § 271 elements, especially given the fact that the FCC has determined in the course of Verizon's § 271 proceeding that the Tariff No. 216 rates are just and reasonable. *Id*. at 8-9.

MCI's position on the merits of the *December Order* is substantially the same as the positions taken by PCC and ARC. The distinguishing feature of MCI's Answer[5] is

[5] Verizon moves to strike MCI's Answer on the ground that MCI was not one of the petitioners in this case and has never filed a Petition to Intervene in this proceeding. Alternatively, Verizon argues that Verizon had consented to an extension of time for "parties" to answer the petition. Given that MCI is not a "party," and therefore not subject to the extension, Verizon argues the MCI Answer should be stricken as untimely. Verizon Motion at 2. MCI responds that it is true that MCI did not formally intervene, but that is because MCI did not intend to present evidence on issues specifically dealing with the enterprise market. When Verizon's Petition brought other issues into the case, MCI argues its rights became

that MCI did not participate in the development of the factual record in this CLEC-initiated investigation, but now argues that this proceeding is not the place for Verizon to challenge the Commission's *Global Order* decision because many CLECs interested in the preservation of the *Global Order* requirements are not on this Docket's service list. MCI Answer at 1-2. MCI argues that Verizon's Petition broadens the scope of this proceeding by challenging the viability of the *Global Order* requirements generally. MCI accepts that Verizon has a procedural right to make such a challenge, but argues that "[i]f Verizon disagrees that the *Global Order* creates a continuing obligation, it should petition the Commission separately, but should not use this proceeding to make such a monumental change in the current legal landscape in Pennsylvania." *Id*. at 3.

In opposition to Verizon's Petition, opponents' citations include *TRO* ¶¶ 191-93, 653, 662, 665; the FCC's *USTA* Brief at 90-91; 47 U.S.C. §§ 152(b), 251(d)(3), 252(e)(3), 253(b), 254(i), 261(b)&(c), 153(41), 601(c), and 706(c); *Verizon Communications Inc. v. Trinko*, *supra*; *Application of Verizon Pa. Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pa.*, *supra*.[6]

Analysis

Whether the Commission Will Consider the Merits of Verizon's Petition

The Commission will only address reconsideration requests that raise new and novel arguments, not previously heard, or considerations that appear to have been overlooked or not addressed by the Commission. *Duick v. Pennsylvania Gas & Water Co.*, 56 Pa. P.U.C. 553 (1982). Thus, reconsideration petitions that raise the same questions as raised previously are improper.

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directly affected, and therefore, it is entitled to respond to the petition. MCI Answer to Verizon Motion at 1-2.

[6] Due to our disposition of the Petition, we do not add parentheticals to these citations.

In this case, we will consider the merits of Verizon's Petition in order to address the guidance and clarifications of the Act and *Triennial Review Order* provided by the federal courts and the FCC since issuance of our *December Order*.

Whether the Commission Will Consider the Merits of MCI's Answer

The section of the *December Order* that is challenged by Verizon's Petition for Reconsideration merely reminded Verizon and the CLECs of the continuing obligations of the *Global Order*, absent further proceedings. Preemption arguments made by the parties in this proceeding had prompted our decision to be clear on the point of whether we viewed the *Global Order* requirements as remaining intact. We specifically stated: "Given the lack of record development and the uncertainty as to an actual conflict, as well as our open and unanswered invitation to [Verizon] to demonstrate that the *Global Order* requirement can be retired, we will not change the *status quo* vis-à-vis access at this time." *December Order* at 15. Similarly, we left the Tariff No. 216 pricing in place. *Id*. at 16.

We continue to believe it was beneficial to the competitive markets to be clear on the status of the *Global Order*. We also note recent support for our position. The D.C. Circuit has decided that the concern we expressed in December about the preemptive effect of the *Triennial Review Order* was premature. *U.S.T.A. v. F.C.C.*, 359 F.3d at 594. Further, the FCC recently observed that uncertainty can be harmful to telephone consumers. Letter of FCC Commissioners to Verizon President & CEO Ivan Seidenberg, dated March 31, 2004, available at http://www.fcc.gov/commissioners/letters/triennial_review/verizon.pdf (stating "telephone consumers are served best by ending this uncertainty and getting back to business"). These actions favor our decision to maintain the status quo pending formal proceedings.

Formal proceedings initiated to address the issue of whether we should amend the *Global Order* would provide all interested parties with notice and an opportunity to be heard as well as assure development of an adequate record. See 66 Pa.C.S. §§ 501(a), 703(g). Because of this, we will simply apply 52 Pa. Code § 1.2(c), which permits a liberal construction of our formal proceeding rules when necessary and appropriate, to allow consideration of MCI's Answer. Therefore, Verizon's Motion to Strike MCI's Answer to Verizon's Petition for Reconsideration will be denied.

Consideration of the Merits of Verizon's Petition for Reconsideration

We grant the petition in part to clarify our position on the pricing of network elements unbundled pursuant to § 271. Contrary to Verizon's suggested interpretation, the *December Order* does not mandate that TELRIC pricing be used to price such network elements. Rather, as observed by ARC, the order merely provides that existing Tariff No. 216 rates be used at present because they are currently in effect and fall within the range of a just and reasonable price. Verizon remains free to exercise all of its rights to propose the establishment of new just and reasonable prices applicable to § 271 network elements.

Since the *Triennial Review Order* did not fully flesh out all the processes, procedures and requirements associated with Verizon's § 271 access obligations, we recognize that it remains unclear as to where and how Verizon's "just and reasonable" rate for access in a particular state (since § 271 is granted on a state-by-state basis) is established and/or disclosed to the requesting carrier. Our review of the *TRO*, the D.C. Circuit's opinion, and even the FCC's brief in the *USTA* litigation, has not provided any clarity on this point. However, given that the Tariff No. 216 is filed with the Commission, the Commission's existing procedures for tariff changes, namely 66 Pa. C.S. §§ 1301 and 1308, are available to be used if Verizon seeks to establish new non-

TELRIC rates for enterprise switching. Meanwhile, the uncertainty again supports our observation that the Tariff No. 216 rates are currently in effect and should be used until a new rate is properly established.[7]

We deny the remaining portion of the petition. We are not persuaded that maintaining the status quo vis-à-vis the *Global Order* requirements is improper. We continue to believe that absent further proceedings, which Verizon is free to initiate, Verizon has a separate and continuing additional unbundling obligation under the *Global Order* to provide unbundled switching and UNE-P to enterprise customers. Support for our view is found in multiple sources, specifically including 47 U.S.C. § 251(d)(3) (preserving state access requirements); and, *U.S.T.A. v. F.C.C.*, 359 F.3d at 594 (holding that our challenge to the preemptive scope of the *TRO* is not ripe because the general prediction voiced in *TRO* ¶ 195 does not constitute final agency action). In particular, the *Global Order* provides that the availability of UNE-P for enterprise customers would not be indefinite and that Verizon may request its termination after December 31, 2003. Verizon has yet to avail itself of this opportunity.

Furthermore, even if the *Global Order* requirements are deemed to be preempted (and no court has so determined), there is support for finding a continuing access obligation in § 271's requirement that Verizon provide access to its local switching. Presently, no FCC decision has relieved Verizon from its ongoing § 271 obligations in Pennsylvania, or fully defined what those obligations are in the wake of the *Triennial Review Order*.[8] We conclude that there is no firm basis for this Commission to

[7] The Commission has tariffs on file that allow Verizon pricing flexibility. See, *e.g.*, Verizon Pennsylvania Inc. Informational Tariff for Competitive Services, Pa. P.U.C. No. 500, Section 2, 1st Revised Sheet 13 at ¶ 29 (providing that the rates for Centrex Service packages "will be determined by the Telephone Company…[and] will range from a floor represented by the costs of furnishing service to a ceiling represented by the rates set forth in Sections 2 and 2A of this Informational Tariff.").

[8] On October 24, 2003, the Verizon telephone companies filed a petition asking the FCC to forebear from § 271 obligations. *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; CC Docket No. 01-338. The matter is pending.

unilaterally sanction removal of a § 271 element from Verizon's offerings in Pennsylvania under the present state of FCC orders. If Verizon believes that its § 271 obligations in Pennsylvania have changed, it should put that issue to the FCC. Upon FCC approval of Verizon's position, modifications of relevant offerings would then be appropriate.

We also note that Verizon may not have to offer such switching in combination under § 271 by virtue of § 251, but it has not been decided whether Verizon must combine the switching with other elements under another legal theory. See *U.S.T.A. v. F.C.C.*, 359 F.3d at 590; *Verizon v. Trinko*, 124 S. Ct. at 882-83 (holding that Verizon may subject itself to state commission oversight under a performance assurance plan).[9] We do not imply a viewpoint on the merits of alternative legal theories, rather, we make these observations to explain why we maintain the status quo in the absence of a fully developed record on the issues raised in Verizon's instant Petition for Reconsideration.

Our action in this regard is without prejudice to Verizon's right to seek further administrative relief, and we invite Verizon to initiate appropriate formal proceedings to address the preemption and pricing issues raised in its Petition for Reconsideration; **THEREFORE**,

IT IS ORDERED:

1. That the Petition for Reconsideration of our Order entered December 18, 2003, filed by Verizon Pennsylvania Inc. on January 2, 2004, and granted pending review and consideration of the merits by Order entered January 21, 2004, is hereby granted-in-part and denied-in-part consistent with the discussion contained in the body of this Order.

[9] The Pennsylvania Performance Assurance Plan measures aspects of Verizon's UNE-P performance.

2. That Verizon's Motion to Strike the Answer of MCI to Verizon's Petition for Reconsideration is denied.

3. That this record shall be marked closed.

BY THE COMMISSION

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: May 27, 2004

ORDER ENTERED: May 28, 2004

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PUBLIC SERVICE COMMISSION

OF WEST VIRGINIA

CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 8th day of June, 2004.

CASE NO. 04-0359-T-PC

VERIZON WEST VIRGINIA, INC.
Petition for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in West Virginia pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order.

COMMISSION ORDER

On March 10, 2004, Verizon West Virginia, Inc. (Verizon-WV) filed a Petition for Arbitration (Petition or Petition for Arbitration) seeking consolidated arbitration for the purpose of implementing, in a streamlined fashion, certain changes in the unbundled network element provisions of Verizon-WV's interconnection agreements with Competitive Local Exchange Carriers (CLECs) and Commercial Mobile Radio Service Providers (CMRSs) in West Virginia. Verizon-WV stated that the changes are necessary in light of the Federal Communications Commission's (FCC's) recent Triennial Review Order (TRO). Verizon-WV stated that it circulated the proposed changes to CLECs and CMRSs in October 2003 based on the provisions of the FCC's TRO. Since that time, the United States Court of Appeals for the District of Columbia Circuit issued an order vacating certain provisions of the TRO and upholding others. *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), issued March 2, 2004, (USTA II).

Verizon-WV asserts that the Court's ruling in USTA II did not change the timetable established by Section 252 of the Communications Act of 1934 (the Act) and the TRO. Verizon-WV stated that it made its filing on March 10, 2004, “at the close of the Section 252 arbitration window” to preserve both its and the other parties' right to obtain the relief granted in the TRO, to the extent such relief is not self-effectuating.

Verizon-WV opined that USTA II may not affect the language of Verizon-WV's

amendment, but that minor revisions may be desirable in the wake of USTA II and Verizon-WV would propose any such revisions by March 19, 2004. Verizon-WV asserted that pursuant to Section 252(b) of the Act and the TRO, the Commission is required to rule on the Petition by July 2, 2004.

Included with Verizon-WV's petition was a motion for *Pro Hac Vice* Admission of Aaron M. Panner.

On March 16, 2004, Commission Staff filed an Initial Joint Staff Memorandum summarizing Verizon-WV's filing and stating that additional investigation would occur prior to Staff's filing of a final recommendation.

On March 19, 2004, Verizon-WV filed an Update to the Petition for Arbitration. The filing included minor revisions to the proposed amendment to the interconnection agreement to reflect USTA II's vacating of some portions of the FCC's TRO and upholding others. Verizon-WV proposed that CLECs be allowed 25 days from the date of this filing, rather than from the March 10, 2004, filing, to respond.

By Order issued March 23, 2004, the Commission allowed responses to Verizon- WV's petition to be filed on or before April 13, 2004.

On April 2, 2004, the Commission's Consumer Advocate Division (CAD) filed a petition to intervene noting that Verizon-WV's petition constitutes a proceeding with potential for adverse effects on ratepayers in West Virginia.

On April 5, 2004, MCImetro Access Transmission Services LLC and Intermedia Communications Inc. (collectively MCI) filed a response to Verizon-WV's petition. MCI reserved its rights with respect to whether the arbitration process should be conducted on a consolidated basis. MCI agreed that there may aspects of this case that are suitable for consolidated resolution. Secondly, MCI reserved the right to argue that the FCC did not intend the TRO to mandate that the timing of requirements of § 252(b) of the Act apply to the negotiation of amendments to contracts that contain a change-of-law provision. Therefore, MCI reserved the right to argue that the change-of-law provisions in its interconnection agreements, and not the timing requirements of § 252(b), are what govern the process of negotiating and arbitrating amendments to implement the TRO.

On April 7, 2004, FiberNet, LLC, petitioned the Commission to extend the response deadline to May 28, 2004. FiberNet noted that on March 31, 2004, FCC Chairman Powell asked that telecommunications carriers engage in a period of good faith negotiations to arrive at commercially acceptable arrangements for the continued

availability of unbundled network elements. The FCC stated its intention to petition the DC Circuit Court for a 45-day extension of the current stay of the USTA II decision and to request that the Solicitor General seek a comparable extension of the deadline for filing a petition for certiorari. FiberNet asked the Commission to issue an order allowing the responses to Verizon-WV's petition to be filed on or before May 28, 2004. Furthermore, FiberNet urged the Commission to prohibit Verizon-WV from either taking

any unilateral action to cease providing currently available unbundled network elements or any other action inconsistent with the parties' current interconnection agreement. This prohibition should remain in effect until the negotiations result in an appropriate amendment of the interconnection agreement, or until the Commission issues a decision on the merits of Verizon-WV's arbitration request.

On April 7, 2004, counsel for Level 3 Communications, LLC, ICG Telecom Group, Inc., DSLnet Communications LLC, Adelphia Business Solutions Operations, Inc., NTELOS of West Virginia, Inc., filed a letter stating an intent to file a motion to dismiss Verizon-WV's petition.

On April 9, 2004, Verizon-WV filed a letter urging the Commission to deny FiberNet's request that the deadline for the filing of responses to Verizon-WV's petition be extended until May 28, 2004. Verizon-WV stated that the FCC's 45-day commercial negotiation period is not a new period of negotiation over an amendment to reflect the TRO rulings and does not affect arbitration of the TRO amendment. Verizon-WV would not oppose extension of the deadline for response until May 31, 2004, and extending the date for decision in this case to August 31, 2004.

On April 13, 2004, the Commission received filings from AT&T Communications of West Virginia, Inc. (AT&T), Citynet West Virginia, LLC (Citynet), the Competitive Carrier Coalition (Coalition), the Competitive Carrier Group, Level 3 Communications, Inc., the Consumer Advocate, Sprint Communications Company, L.P., American PCS Communications, LLC, and Wirelessco, L.P. and the Staff. The substance of these filings was as follows:

AT&T filed a Response to Verizon-WV's petition and a Motion to Dismiss Verizon-WV's Update to petition filed on March 19, 2004. AT&T argued that the petition should move forward on some issues, but that two issues are non-arbitrable because USTA II has not yet taken effect. AT&T argues that non-arbitrable issues include: (1) Verizon-WV's continuing obligation to provide UNEs under the Bell Atlantic/GTE Merger Order conditions until the TRO is final and non-appealable; and (2) the issue of routine network modifications because the TRO only clarifies the existing legal obligations that Verizon-WV continues to ignore, but does not constitute a change

of law permitting amendment of the interconnection agreement between AT&T and Verizon-WV. AT&T goes on to discuss its disagreement with numerous of Verizon- WV's proposed amendments. Furthermore, AT&T identifies an additional area, regarding seamless batch hot cut process, where amendment to the interconnection agreement is warranted.

Citynet filed a Motion to Dismiss, Stay or Continue Arbitration, and, alternatively, its Answer to Verizon-WV's Petition and Update. Citynet basis its motion on Verizon's failure to detail unresolved issues and describe the positions of the parties on those issues. Citynet asserts that it did timely and reasonably respond to Verizon-WV's proposed amendments to the interconnection agreement. Citynet considers itself to be negotiating with Verizon-WV. Citynet goes on to identify its disagreement with certain of Verizon- WV's proposed amendments.

The Competitive Carrier Coalition filed a Motion for *Pro Hac Vice* Admission of Russell M. Glau and

Jonathan S. Frankel to appear on its behalf. The Coalition also filed a Petition to Intervene, Motion to Dismiss and Response to Verizon-WV's Petition. The Coalition consists of Adelphia Business Solutions Operations, Inc., dba TelCove; DSLnet Communications, LLC; ICG Telecom Group, Inc.; and NTELOS of West Virginia Inc.

In its Motion, the Coalition noted that the petition is premature because Verizon- WV must offer UNEs under the Bell Atlantic/GTE merger conditions under its existing agreement until the TRO is final and non-appealable, which it is not. Second, the petition fails to comply with procedural requirements mandated by law. These requirements pertain to identifying and stating the positions of the parties with respect to issues presented in the petition. The requirements also pertain to properly requesting arbitration as required by the Commission's Rules of Practice and Procedure. Third, consideration of the petition would be a waste of Commission resources because the law upon which the petition is based is still undetermined. Finally, the rates Verizon seeks to impose for routine network upgrades are not a product of a change of law and Verizon-WV is already recovering the costs for such upgrades in its recurring UNE rates.

In summary, the Coalition requested that the Commission 1) maintain this docket to assert its Section 252 jurisdiction over all issues naturally related to the parties' interconnection agreements; 2) issue a standstill order that maintains the *status quo* under existing interconnection agreements until such time as the Commission ultimately approves an interconnection agreement amendment that reflects all applicable law; 3) to evaluate the USTA II decision and determine whether its holdings will be subject to Supreme Court review. The Commission should hold those issues that are affected by the USTA II decision in abeyance until such issues are resolved. Thereafter, the Commission

should direct the parties to attempt a negotiated agreement to address those issues over a subsequent 135-day period which would trigger a new phase of the arbitration proceeding.

The Competitive Carrier Group, consisting of Broadview Networks Inc., Business Telecom Inc., Essex Acquisition Corp., FiberNet, LLC, IDT America Corp., KMC Telecom III Inc., KMC Telecom V Inc., and XO Long Distance Services Inc., also filed an Answer. The Group stated that Verizon-WV has never responded to counteroffer amendments put forth by members of the Group, nor made an effort to establish a negotiation schedule. The Group disagreed with Verizon-WV's one-sided interpretation of the USTA II decision, and characterized its March 19, 2004, update as another attempt to strip away more from Verizon-WV's Section 251 obligations. The Group noted that in contrast to its petition in this state, in other states Verizon has petitioned to stay TRO implementation proceedings on grounds that USTA II invalidates both the FCC's delegations of authority to determine whether CLECs are impaired without access to unbundled elements, and the substantive tests that the FCC promulgated for making such determinations. Therefore, continuing TRO proceedings is inefficient for both the parties and the Commission. Instead of dismissing this proceeding, the Group urged the Commission to establish procedures for arbitration that address the TRO, the USTA II, state law, and other federal law requirements (such as 271 obligations) in order to minimize duplication of effort and promote the most efficient use of the Commission's resources.

The Group also requested that the Commission issue a stand-still order maintaining the status quo until the Commission approves a global interconnection agreement amendment; hold all issues impacted by USTA II in abeyance until resolved and then direct the parties to reach a negotiated agreement over a subsequent 135-day period; to the extent the parties cannot reach a negotiated agreement, the parties should submit a jointly-developed issue list at the end of the 135 days which would trigger another phase of the arbitration proceeding; immediately implement the FCC's clarification that Verizon must perform routine networks modifications to provision UNE orders and address Verizon's section 271 and merger condition access and pricing obligations, which were not affected by USTA II.

Level 3 Communications, Inc. filed an objection to being named as a party to this arbitration. Level 3 and Verizon-WV are actively negotiating an interconnection agreement including terms that will govern Verizon-WV's provision of unbundled network elements to replace the parties existing agreement. Level 3 also objected to Verizon-WV's filing as untimely because it did not adhere to the change-of-law and dispute resolution procedures in the parties' agreement before filing this petition for

arbitration. Level 3 supported the Competitive Carrier Coalition's motion to dismiss.

The CAD filed a Motion to Dismiss. CAD cited USTA II's vacating and remanding portions of the TRO. CAD opined that the state of affairs governing ILECs' unbundling obligations is very unsettled. State commissions that had been conducting impairment and related proceedings for various UNEs have been thrown into disarray. Many have suspended those proceedings in whole or part. The FCC has likewise been knocked off-kilter, CAD stated. On April 9, 2004, the FCC and the United States filed a motion to extend the D.C. Circuit's stay, to allow negotiations to arrive at commercially acceptable arrangements for the availability of UNEs, for an additional 45 days. CAD went on to argue that Verizon-WV's petition is not appropriate under Sections 251 and 252 of the Act; Verizon-WV's petition does not comport with the requirements of Section 252(b) of the Act; Verizon-WV has recourse with the FCC if the Commission dismisses this petition; and in any event, the Commission should extend the parties' substantive response deadlines to May 31, 2004.

Sprint Communications Company, L.P., American PCS Communications, LLC, and Wirelessco, L.P. (Sprint *et al*) collectively filed a Motion to Dismiss and Response to Verizon-WV's petition. Sprint *et al* stated that Verizon-WV has failed to negotiate with Sprint regarding the changes it wishes to incorporate into the existing Sprint/Verizon-WV interconnection agreement as required by the Act. Sprint cited a recent North Carolina Utilities Commission holding that a similar petition filed by Verizon-WV in North Carolina should be continued indefinitely because of the TRO; and because Verizon-WV had failed to comply with procedural rules for filing arbitrations. The Maryland Commission similarly rejected a petition by Verizon-WV, stating it was premature because of the uncertain status of the TRO.

Sprint characterized this Verizon-WV petition as an attempt to deprive other carriers of the opportunity to negotiate in good faith under the Act for an appropriate interconnection agreement amendment pursuant to the provisions of the TRO. The Commission should dismiss the petition on grounds that: 1) it is an improper attempt to circumvent good faith negotiations; and 2) the petition fails to meet even the most minimal pleading requirements contained in the Act and the Commission's rules

governing negotiations and arbitrations. If the Commission declines to dismiss with prejudice, Sprint requests that the Commission dismiss without prejudice and direct Verizon-WV to submit a pleading that 1) demonstrates with specificity that Verizon-WV has attempted to negotiate in good faith relative to Sprint and each entity with which Verizon-WV seeks to arbitrate; and 2) demonstrates how Verizon-WV has complied with the Act and this Commission's rules for negotiations and arbitrations.

Commission Staff filed a Motion to Dismiss. Staff opined that the FCC, in its TRO, erroneously concluded that negotiations of interconnection agreements were deemed to commence upon the effective date of the TRO. Staff opined that this holding was inconsistent with the statutory requirements of §§ 251 and 252 of the Act and that the trigger mechanism for negotiation is the ILEC's receipt of a request for interconnection or negotiation. Staff cited in its Motion to Dismiss a similar Virginia proceeding, filed by the Virginia Commission's Staff, which argued that Verizon-WV is attempting to ignore that the Act requires Verizon-WV to undertake negotiations or arbitration only after it has received a request from another carrier. Staff believes that Verizon-WV's filing adversely affects other parties by inhibiting their ability to request negotiation or arbitration, and to freely negotiate terms and conditions changes in the agreements.

Staff further believes the filing is insufficient pursuant to Section 252 of the Act in that it fails to provide information concerning: 1) unresolved issues; 2) position of each of the parties on those issues; and 3) other issues discussed and resolved by the parties. Verizon-WV says it could not provide this information because the CLECs have failed to respond.

On April 14, 2004, Commission Staff filed a Further Initial Joint Staff Memorandum. In this memorandum, Staff recommended that the Commission grant FiberNet's request for an extension of the response deadline until May 31, 2004, to allow other parties the ability to respond.

On April 15, 2004, FiberNet's local counsel filed two Motions for *Pro Hac Vice* Admission of Michael B. Hazzard and Genevieve Morelli.

On April 19, 2004, MCI's local counsel filed Motions for *Pro Hac Vice* Admission of Kimberly A. Wild.

Also on April 19, 2004, Verizon-WV filed a letter stating its intent to file a consolidated response to the various motions to dismiss/delay this proceeding.

On April 23, 2004, AT&T filed a Response to the Competitive Carrier Coalition's April 13, 2004, petition. AT&T stated its position that this arbitration should move forward on those issues that are relevant and arbitrable. There are issues, however, that are not ready for arbitration and should be stricken. The non-arbitrable issues result from the fact that USTA II has not yet taken effect. So, for those issues, there has not been a change of law to arbitrate. The two non-arbitrable issues are 1) Verizon-WV's continuing obligation to provide UNEs under the Bell Atlantic/GTE Merger Order conditions until

the TRO becomes final and non-appealable; and 2) the issue of routine network modifications is not subject to arbitration because the TRO only clarifies the existing legal obligations that Verizon-WV continues to ignore, but does not constitute a change of law permitting amendment of the interconnection agreement between AT&T and Verizon-WV.

On April 28, 2004, Verizon-WV filed an Opposition to Motions to Dismiss. Verizon-WV states that Staff is encouraging the Commission to ignore the FCC's procedures for revising interconnection agreements by stating that the FCC improperly “chose to ignore the language of the Act” when it determined that the time line for arbitrations would be deemed to commence upon the effective date of the TRO, rather than upon the actual receipt by an ILEC of a CLEC's request to negotiate. The CAD voices the same complaint. Verizon-WV argues that Staff and CAD both overlook the fact that the FCC's procedural ruling, in addition to being correct, is binding federal law in any event, and may not be challenged in a collateral proceeding such as this arbitration.

As to Staff's argument that Verizon-WV failed to comply with formal requirements embodied in Section 252(b) of the Act (which requires that arbitration petitions set forth positions of other parties on unresolved issues), Verizon-WV states that this argument overlooks the untimeliness with which the CLECs responded, if at all, to Verizon-WV's draft interconnection agreement and the impossibility for Verizon-WV to summarize unknown positions. Furthermore, CLECs are able in their own words to file their positions with the Commission in this proceeding.

In response to CLECs' arguments that Verizon-WV's petition is premature because the Bell Atlantic/GTE merger conditions require Verizon-WV to continue to provide UNEs until the TRO is final, Verizon-WV stated that the merger conditions were effective for only three years, and expired July 2003.

In response to arguments that the law is too unsettled for the Commission to consider Verizon-WV's petition, Verizon-WV argued that these claims are baseless. The TRO was upheld in numerous respects, particularly as to reducing federal unbundling requirements. Verizon-WV's draft amendments are designed to accommodate the possibility of future legal developments, including the possible stay or reversal of the USTA II.

As to the CLECs' challenge that part of Verizon-WV's amendment pertaining to routine network modifications are based on the TRO's clarification and not on a change in law that must be incorporated into an amendment, Verizon-WV argues that the FCC never asserted that its prior rules required incumbents to perform routine network

modifications. This undercuts the CLECs hypotheses that the costs of those modifications are somehow reflected in Verizon-WV's existing rates. The FCC has never required that network modifications be made at no charge.

Verizon-WV went on to note that the process established by the FCC governing arbitration of new interconnection agreements is mandatory. The FCC's decision to use Section 252(b) as a default timetable

was sensible. Verizon-WV's petition for consolidated arbitration was designed to make the amendment process as efficient and manageable as possible. Verizon-WV also argues that its petition substantially complies with the applicable requirements of Section 252(b). Verizon-WV argues that the Bell Atlantic/GTE Merger does not prevent implementation of the TRO. Verizon-WV states that the merger conditions have expired because of the D.C. Circuit's decision in *United States Telecomm Ass'n v. FCC* 290 F.2d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003). The merger conditions also expired due to their own sunset clause making virtually all conditions expire 36 months from the closing date of July 2000. Verizon-WV urges the Commission to find that the law is not uncertain and that prompt implementation of the TRO is critical.

On May 6, 2004, the Competitive Carrier Coalition filed a Reply to Verizon-WV's Oppositions to the Motion to Dismiss. In this reply the Coalition argues; (1) that Verizon- WV's obligation to offer UNEs as required by the Bell Atlantic/GTE Merger Order still continues; (2) Verizon-WV's petition blatantly defies the procedural requirements mandated by federal law and this Commission; (3) the arbitration is doomed to yield half- baked results due to the tremendous uncertainty of the law that needs to be applied; and (4) an amendment is not needed for Verizon-WV to comply with its pre-existing legal duty to offer routine network modifications when provisioning UNEs, and Verizon-WV is already recovering the cost of doing so.

Also on May 6, 2004, Verizon-WV filed a Motion to Hold Proceeding In Abeyance until June 15, 2004. Verizon-WV stated that this motion was filed in order to avoid interfering with ongoing TRO commercial negotiations. June 15, 2004, is the date on which the D.C. Circuit Court's mandate in USTA II is currently scheduled to issue. Verizon-WV states that its motion is made in recognition that the parties have limited resources and that parties will be able to devote their attention to commercial negotiations without the distraction of simultaneous litigation as to whether this proceeding is the appropriate forum for resolving TRO issues. To ensure that no party is prejudiced by the abeyance, Verizon-WV asked that the Commission toll the time for completion of this arbitration that would otherwise apply under 47 U.S.C. 252(b)(4)(C).

Thereafter, each of AT&T, the Competitive Carrier Group, and MCI, filed separate

Responses to Verizon-WV's Motion to Hold Proceeding in Abeyance. These parties opposed Verizon-WV's motion with regard to issues not affected by USTA II. The Group agreed that issues affected by USTA II should be held in abeyance until June 15, 2004, with the express condition that Verizon maintain the status quo pending resolution of USTA II issues.

On May 18, 2004, the CAD filed a copy of an order dismissing a similar proceeding issued by the Public Utilities Commission of New Hampshire.

On May 21, 2004, Citynet West Virginia LLC filed a renewal of its April 12, 2004, Motion to Dismiss.

On May 27, 2004, Verizon-WV filed a letter stating its intent to file on June 3, 2004, a response to

issues raised in the CLEC's oppositions to Verizon's motion to hold proceeding in abeyance.

On May 28, 2004, FiberNet filed a Further Response to Verizon-WV's motion to hold proceeding in abeyance. FiberNet urged the Commission to act now to prevent the chaos that will ensue if on June 16th, Verizon-WV carries out its stated intention to cease unbundling dedicated interoffice transport and high-capacity lops, on the mistaken assumption that the unbundling requirements for those elements were vacated in USTA II. The Commission should direct Verizon-WV to continue offering UNEs--particularly dedicated interoffice transport (including dark fiber interoffice transport) and high- capacity loops--at the rates, terms and conditions presently contained in its interconnection agreements with FiberNet and other similarly situated CLECs in West Virginia until the FCC establishes new rules or the existing FCC rules are reinstated.

On June 2, 2004, the Competitive Carrier Group filed a motion for *pro hac vice* admission of Andrea Pruitt Edmonds.

DISCUSSION

Upon review of all of the foregoing, and with awareness of proceedings in some sister states, the Commission will not dismiss this case, but rather, will hold this case in abeyance until after June 15, 2004. On or before June 15, 2004, each of the parties will be required to file an outline in the format of Attachment A. The Commission directs each party to follow the Attachment A format so that comparison of party positions can be easily and consistently prepared. If a party has no position or has no disagreement with any element in the outline, the party should so indicate. If the outline in Attachment A fails to identify every relevant interconnection agreement issue, the parties may add any

missing issues to their respective outline filings, following, as much as possible, the format of Attachment A.

Sprint has alleged that Verizon failed to negotiate in good faith prior to filing this global arbitration petition. *See* Sprint's Motion to Dismiss. Although the Commission certainly believes that Verizon has an obligation to negotiate, we are also of the opinion that one-on-one negotiations between Verizon and the separate CLECs may not be preferable to global negotiations. Furthermore, good faith negotiations may occur during the pendency of this proceeding.

Sprint, CAD, and the Coalition argue in their motions to dismiss that Verizon failed to adhere to the requirements of Section 252(b)(2) of the Act and of Rule 15.5.g.3. of the Commission's Telephone Rules because it did not file certain documentation along with its Petition. The Commission finds that Verizon's petition, together with the filings required by this Order, will bring the parties and this proceeding into substantial compliance with the Section 252 and Telephone Rule requirements.

CAD's Motion to Dismiss argues that the FCC's negotiation scheme upon which Verizon-WV relies,

is contrary to that of Congress. Congress contemplated that an ILEC's request to a CLEC to negotiate an interconnection agreement would be the initial trigger for negotiation duties, followed, only if necessary, by either party's petition to a State Commission to arbitrate disagreements. *See* 47 U.S.C. § 252(a)(1); 47 U.S.C. § 252(b)(1). CAD describes the FCC's TRO as an attempt to speed up negotiations by deleting the conditions precedent of an ILEC request for negotiation, and instead deemed negotiations to commence upon the effective date of the TRO. CAD argues that this is impermissible. Notwithstanding this alleged conflict, the Commission will not dismiss this arbitration. In the interest of proceeding with global amendment of interconnection agreements, we will proceed with this case. Due to the conflict regarding trigger or start dates of negotiation/arbitration contemplated by the Act and by FCC, the Commission is of the opinion that negotiations should not be deemed to have begun until June 15, 2004, as further explained below.

With regard to the decision due date requirements set forth in Section 252(b) of the Act and in the TRO, this Commission is committed to move forward on an expedited basis to arbitrate the interconnection agreements. There are questions regarding the application of Section 252 time limits and the effect of Court decisions on the FCC's TRO. These questions notwithstanding, Commission believes that the FCC is intent on seeking the timely assistance and guidance from State Commissions on a best efforts basis and that we should attempt to meet the Section 252 timetables. In its May 6, 2004, Motion to Hold Proceeding in Abeyance, Verizon-WV indicated a willingness to toll any such

due date. In AT&T's Response to Verizon's Motion, AT&T agreed that tolling is appropriate if this case is held in abeyance. *See* AT&T Response, p. 3, fn 5. Accordingly, the Commission hereby finds that if the Commission is in fact required to complete arbitration proceedings by a date certain (e.g. 9 months from the date a local exchange carrier received a request for negotiations), then we shall deem the start date for calculating any such time period to be June 15, 2004. Nevertheless, the Commission will attempt to compress the time required for final arbitration to the extent possible.

In the period prior to June 15, 2004, in addition to preparing the required outlines, the parties are expected to begin or continue, as the case may be, negotiations in good faith toward reaching mutually acceptable, comprehensive, interconnection agreements.

Also in this Order, the Commission will require Verizon-WV to continue to provide UNEs, including but not limited to: dedicated interoffice transport (including dark fiber interoffice transport), high-capacity loops, and mass market switching - at the rates, terms and conditions presently contained in its existing interconnection agreements in West Virginia, unless or until the Commission authorizes Verizon-WV to cease providing specific UNEs. Provision of UNEs is required because this Commission has not determined that local competition can continue to exist or to grow in their absence.

Finally, pursuant to Rules 12.6. and 12.7. of the Commission's Rules of Practice and Procedure (Procedural Rules), the Commission will grant all pending petitions to intervene and motions for *pro hac vice* admission to practice law filed to date in this proceeding.

As to the petitions to intervene, we find that each intervening party has a legal interest sufficient to

justify intervenor status pursuant to Procedural Rule 12.6.

FINDINGS OF FACT

1. Currently pending before the Commission are various petitions to intervene and motions for *pro hac vice* admission to practice law; and a motion to hold proceeding in abeyance filed by Verizon-WV.

2. Prior to Verizon-WV's motion, several CLECs and the CAD had requested dismissal of this proceeding.

3. Prior to and following Verizon-WV's motion, several CLECs opposed dismissal of, or abeyance of, this proceeding, with respect to issues that were not the

subject of remand in USTA II.

4. Verizon-WV has suggested that this Commission toll the time for completion of this arbitration that would otherwise apply under 47 U.S.C. 252(b)(4)(C).

CONCLUSIONS OF LAW

1. Upon review of all of the foregoing, and with awareness of proceedings in some sister states, the Commission will hold this case in abeyance until after June 15, 2004, except that each of the parties will be required, on or before June 15, 2004, to file an outline in the format of Attachment A.

2. If the outline in Attachment A fails to identify every relevant interconnection agreement issue, the parties may add any missing issues to their respective outline filings.

3. If the Commission is in fact required by Section 252 of the Act, to complete arbitration proceedings by a date certain (e.g. 9 months from the date a local exchange carrier received a request for negotiations), then the start date for calculating any such time period is hereby deemed to be June 15, 2004.

4. The Commission will not dismiss this case on grounds that Verizon has failed to negotiate in good faith prior to filing this global arbitration petition. Good faith negotiations may occur during the pendency of this proceeding and one-on-one negotiations between Verizon and the separate CLECs may not be preferable to global negotiations.

5. The Commission finds that Verizon's petition, together with the filings required by this Order, will bring the parties and this proceeding into substantial compliance with Section 252 of the Act and Rule 15.5.g.3. of the Commission's Telephone Rules.

6. The Commission will not dismiss this arbitration on grounds that the FCC's start date of negotiation/arbitration impermissibly conflicts with the negotiation time line contemplated by the Act. In the interest of proceeding with global amendment of interconnection agreements, we will proceed with this case.

7. Due to the conflict regarding trigger or start dates of negotiation/arbitration contemplated by the Act and by FCC, it is reasonable and appropriate to deem that negotiations will have begun as of June 15, 2004.

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8. In the period prior to June 15, 2004, in addition to preparing the required outlines, the parties are expected to begin or continue, as the case may be, negotiations in good faith toward reaching mutually acceptable, comprehensive, interconnection agreements.

ORDER

IT IS THEREFORE ORDERED that the motions for *pro hac vice* admission of Aaron M. Panner, Russell M. Glau, Jonathan S. Frankel, Michael B. Hazzard and Genevieve Morelli, Kimberly A. Wild, and Andrea Pruitt Edmonds, are hereby granted.

IT IS FURTHER ORDERED that all pending petitions to intervene are hereby granted.

IT IS FURTHER ORDERED that formal proceedings in this case are hereby held in abeyance until after June 15, 2004.

IT IS FURTHER ORDERED that the parties are expected and encouraged to begin or continue, as the case may be, negotiations in good faith toward reaching mutually acceptable, comprehensive, interconnection agreements.

IT IS FURTHER ORDERED each of the parties shall, on or before June 15, 2004, file an outline in the format of Attachment A hereto. If the outline in Attachment A fails to identify every relevant interconnection agreement issue, the parties may add any missing issues to their respective outline filings.

IT IS FURTHER ORDERED that any decision due date for this Commission in this case, that may be required pursuant to 47 U.S.C. 252(b)(4)(C), shall be calculated from a start date of June 15, 2004.

IT IS FURTHER ORDERED that Verizon-WV is required to continue to provide UNEs, including but not limited to: dedicated interoffice transport (including dark fiber interoffice transport), high-capacity loops, and mass market switching - at the rates, terms and conditions presently contained in its current interconnection agreements, unless or until the Commission authorizes Verizon-WV to cease providing specific UNEs.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall serve a copy of this order on all parties of record by First Class United States Mail, and upon Commission Staff by hand delivery.

JML/ljm
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ATTACHMENT A

[NAME OF PARTY]

INTERCONNECTION AGREEMENT

OUTLINE OF ISSUES FOR ARBITRATION

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

CASE NO. 04-0359-T-PC

Amendment to the Interconnection Agreement, item 6., "Stay or Reversal of the TRO":

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, General Condition 1.1.:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, General Condition 1.2.:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

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4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, General Condition 1.3.:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, TRO Glossary:

1. What glossary item(s) does the filing party disagree with?

2. For each item of disagreement, what is the filing party's position?

3. Why do the parties disagree?

4. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.1.1, High Capacity Loops:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.1.2, Fibre to the Home Loops:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.1.3, Hybrid Loops in General:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.1.4, IDLC Hybrid Loops:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.2, Line Sharing:

1. Is there agreement on the proposed language?

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2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.3, Subloops:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.4.1, and 3.4.2. Circuit Switching:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.4.3, Signaling/Databases

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

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4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.5, Interoffice Facilities:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.6, Commingling and Combinations:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.7, Routine Network Modifications:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

TRO Attachment to the Amendment, Section 3.8, Transitional Provisions for Nonconforming Facilities:

(Specifically address Sections 3.8.1.1 and 3.8.1.2 separately to indicate specific agreement or disagreement with this language)

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

Pricing Attachment to the Amendment:

1. Is there agreement on the proposed language?

2. If there is no agreement, what is the question for the Commission to decide?

3. What is the filing party's position?

4. Why do the parties disagree?

5. Is this issue arbitrable?

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WASHINGTON (Reuters) - U.S. Federal Communications Commission (news - web sites) Chairman Michael Powell said on Thursday he plans to draft new rules for leasing access to the four local telephone carriers' networks after the Bush administration said it would not defend old regulations.

The administration on Wednesday said it would not challenge an appeals court ruling that struck down FCC (news - web sites) rules that forced the big local carriers, known as the Baby Bells, to lease access to their networks at government-set rates.

"We will begin immediately," Powell told reporters after the agency's monthly open meeting. "I'm quite optimistic with the new guidance and understanding what our limits are, we'll be relatively expeditious at this."

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